Filed 8/10/09 P. v. Crittendon CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES CRITTENDON, Defendant and Appellant.	B210520 (Los Angeles County Super. Ct. No. BA332903)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patricia J. Titus, Judge. Affirmed.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Julie A. Harris, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Charles Crittenden was convicted, following a jury trial, of one count of possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a). Appellant admitted that he had suffered a prior felony conviction within the meaning of Penal Code[1] sections 667, subdivisions (b) through (i) and 1170.12 (the "Three Strikes" law). The trial court sentenced appellant to the low term of 16 months in state prison, doubled pursuant to the Three Strikes law to 32 months.

Appellant appeals from the judgment of conviction, contending that there is insufficient evidence to support his conviction, and further contending that the trial court erred in denying his motion for acquittal made pursuant to section 1118.1. We affirm the judgment of conviction.

Facts

On the afternoon of November 28, 2007, Los Angeles Police Officer David Chapman and his partner Officer Salvador Reyes were conducting surveillance from an unmarked van parked on Stanford Avenue in downtown Los Angeles. The officers watched a man, Hollis, approach another man and give him some money. The man took a black plastic bindle out of his pocket and gave Hollis an off-white solid object resembling cocaine. Police officers identified the seller as Northern Williams, appellant's co-defendant in this case.

Officers Chapman and Reyes next saw appellant approach the seller, hand him some money and receive an off-white solid object resembling rock cocaine. Using a walkie-talkie, Officer Chapman directed Los Angeles Police Officers Armando and Avila to arrest appellant and the seller. As Officers Armando and Avila approached appellant, he placed an item on a nearby shopping cart. Officer Armando arrested appellant while Officer Avila recovered the item from the shopping cart. The item was an off-white solid object resembling rock cocaine. A glass cocaine pipe was found in appellant's pants pocket.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Williams was also arrested by police officers. He had $196.00 in small bills, but no black plastic bag or cocaine on his person. The jury in this case acquitted Williams of the charge of selling cocaine.

The evidence recovered by the officers was booked into evidence by Officer Chapman. The off-white substance recovered from the shopping cart was tested and determined to be cocaine. According to the forensic specialist who tested the object, its weight was 0.06 grams. Officer Chapman testified that the cocaine recovered from appellant was a usable quantity.

At trial, appellant testified that on November 27, he bought four pipes and four lighters for $2 from a man on Stanford Avenue. He hoped to sell them to crack addicts for a profit. Appellant walked away after the sale and leaned against a wall. A man asked him if he had any crack cocaine. Appellant replied, "No." A car pulled up in front of him, police officers jumped out, and appellant was arrested. The nearest shopping cart to him was 15 or 20 feet away. Appellant saw Officer Avila walk over to that cart and retrieve an object. The officer said, "I got it."

At trial, Williams offered the testimony of two men who had been convicted of drug-related offenses in the past.[2] They testified that they had been framed by Officer Chapman.

Williams testified on his own behalf that he had turned his life around and been working selling cleaning products and detailing cars since he got out of prison for a previous crime. Williams claimed that he was on Stanford Avenue on November 28 because he was dropping off an employee after work. He was looking for others to work for him when he was arrested by police. He was not selling cocaine, or any other drug.

[2] Williams learned of these men through a *Pitchess* motion.

Discussion

1. Sufficiency of the evidence

Appellant contends that there is insufficient evidence to show that he possessed a usable quantity of cocaine, and thus insufficient evidence to support his conviction for possession of cocaine. He further contends that such a conviction violates his federal constitutional rights to due process.

In reviewing the sufficiency of the evidence, "courts apply the substantial evidence test. Under this standard, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence* - that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People* v. *Cuevas* (1995) 12 Cal.4th 252, 260-261, internal quotation marks and citations omitted.)

"Although [a reviewing court] must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. Thus, if the verdict is supported by substantial evidence, [a reviewing court] must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People* v. *Jones* (1990) 51 Cal.3d 294, 314, internal citations omitted.) When two or more inferences can reasonably be deduced from the facts, a reviewing court cannot substitute its deductions for those of the trier of fact. (*People* v. *Ochoa* (1993) 6 Cal.4th 1199, 1206.)

If a reviewing court determines "that a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution." (*People* v. *Osband* (1996) 13 Cal.4th 622, 690.)

In order to be convicted of the offense of possession of a controlled substance, a defendant must be shown to possess a usable quantity of that substance. (*People* v. *Palaschak* (1995) 9 Cal.4th 1236, 1242.) Usability is a question of fact that may be

established by expert opinion testimony. (*People* v. *Marquez* (1986) 188 Cal.App.3d 363, 369.) However, a defendant may not be convicted of possession of a controlled substance if "the substance possessed simply cannot be used, such as when it is a blackened residue or a useless trace." (*People* v. *Rubacalba* (1993) 6 Cal.4th 62, 66.)

The evidence of usability came from Officer Chapman, who had participated in over 2,500 narcotics related arrests, 90 percent of which involved cocaine. He had bought and sold narcotics as an undercover officer. He had spoken to thousands of narcotics users and with many experienced police officers who provided him with training on narcotics-related crimes. In Officer Chapman's opinion, the quantity of cocaine recovered from appellant was a usable amount.

Appellant contends that Officer Chapman did not in fact testify that the piece of cocaine recovered from him was usable, but only that 0.5 grams of cocaine was a usable amount. He points out that Andrea Mazzola, the forensic specialist who analyzed the cocaine recovered from the shopping cart, testified that the cocaine weighed 0.06 grams. Appellant also contends that photographs of the cocaine show that it is about 1/8 to 1/16 of an inch square and that the thickness of the piece cannot be determined from the photograph. Appellant concludes that there is no evidence that 0.06 grams of cocaine is a usable amount. We do not agree.

Officer Chapman testified as follows:

Prosecutor: "What about the rock recovered in this case, what is the value of that rock?"

Officer Chapman: "Approximately $5 rock."

Prosecutor: "5/10ths of a gram?"

Officer Chapman: "Approximately, yes."

* * * * *

Prosecutor: "What do you do with the evidence?"

Officer Chapman: "I prepare it and package it and it's booked later on at property division."

Prosecutor: "And you prepare a report?"

Officer Chapman: "Yes."

Prosecutor: I have an eight-and-a-half -- By the way, the 5/10ths that we are talking about, that rock, is that a sellable amount?

Officer Chapman: "Yes."

Prosecutor: "Is it a usable amount?"

Officer Chapman: "Yes."

The prosecutor then displayed a poster board with the photographs of all the items seized at the time of the arrests. The photographs showed that Officer Chapman, who booked the cocaine into evidence, estimated the cocaine's weight as 0.7 grams.

Officer Chapman was clearly referring to the cocaine in evidence in this case, not to some abstract amount. He was equally clearly mistaken about the weight of that cocaine, and had been from the beginning of the case. Even with the mistake as to weight, Officer Chapman's testimony is sufficient evidence of usability. '"The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions.'" (*In re Robert V.* (1982) 132 Cal.App.3d 815, 821.)

The jury could have chosen to reject all of Officer Chapman's testimony due to the mistake in weight, or the jury could have decided that Officer Chapman's opinion was not based on the weight of the cocaine piece but on its size, and that the actual weight was not important.[3] No scales were used in the transactions in this case to weigh the cocaine being sold. Buyers appeared to judge the amount of cocaine by its size. Officer Reyes testified that both Hollis and appellant looked at the bindle of cocaine before walking away from the seller. Specifically, he testified that after appellant received the cocaine

---

[3] On cross-examination, referring to the cocaine piece, appellant's counsel asked Officer Chapman: "This was a very small item, was it not?" The officer replied: "It's a small item." Thus, Officer Chapman was aware of the small size of the cocaine piece. The officer added that "the best way to describe it is about the size of a tip of a pencil eraser." We have viewed the photographs of the cocaine entered into evidence at trial, and agree with Officer Chapman's assessment of the size of the cocaine. Based on the rulers shown in the photographs, the size of the piece was about 3/16 inch by 1/8 inch.

piece from the seller, appellant "looked at his palm, appeared to bring it closer to his eyesight or to his eyes" and then closed his palm and walked away.

To the extent that appellant contends that 0.06 grams of a solid containing cocaine is not usable as a matter of law, we do not agree. The cocaine in this case was a discrete discernible object, not mere residue or traces of a narcotic found on the surface of a container or an object used to consume the narcotics. Experts in two other cases have testified that 0.03 grams of rock cocaine and 0.05 grams of rock cocaine are usable amounts. (*People* v. *Germany* (2005) 133 Cal.App.4th 784, 787 [0.03 grams]; *People* v. *Howze* (2001) 85 Cal.App.4th 1380, 1387 [0.05 grams].) Appellant has not cited any cases to the contrary.

Further, even without Officer Chapman's testimony substantial circumstantial supports the jury's verdict. Whether a quantity of narcotics is a usable amount may be inferred from the surrounding circumstances. (*People* v. *Camp* (1980) 104 Cal.App.3d 244, 247-248.)

Here, several police officers observed appellant hand money to a man the officers identified as co-defendant Williams and receive a cocaine rock in return. As appellant acknowledges, jurors may reasonably infer that an individual would not buy an amount of drugs that were unusable for consumption and the amount purchased was a usable amount. (See, e.g., *People* v. *Mata* (1986) 180 Cal.App.3d 955, 959; *People* v. *Gossett* (1971) 20 Cal.App.3d 230, 234 [fact that parties treated substance as a saleable quantity is evidence that it is a usable quantity].) Such an inference would be reasonable in this case, particularly since appellant closely examined the cocaine after he purchased it.

Appellant contends that the jury did not believe that appellant purchased the cocaine from Williams, since the jury acquitted Williams of the charge of selling cocaine, and so the purchasing inference does not apply. It is not possible to know why jurors acquitted Williams. The jurors clearly believed at least a part of the officers' account of events, since they convicted appellant of the charge against him. The jurors might simply have acquitted Williams because they believed that the officers were mistaken about the identity of the seller, that is they might have believed that the officers saw appellant

purchase cocaine from someone, but that that person was not Williams. Williams's counsel asked numerous times if there were other men standing near Williams on the street.

There is substantial evidence to support appellant's conviction. A rational trier of fact could have found the essential elements of appellant's crime proven beyond a reasonable doubt. Thus, appellant's due process claim fails.

2. Section 1118.1 motion

Appellant contends that the trial court erred in denying his motion to dismiss for insufficiency of the evidence made pursuant to section 1118.1 at the close of the People's case-in-chief. We see no error.

In evaluating a section 1118.1 motion, a trial court determines """whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.""" (*People* v. *Cole* (2004) 33 Cal.4th 1158, 1213.) This is the same standard that an appellate court applies in reviewing the sufficiency of the evidence to sustain a conviction. (*Ibid*.)

Officer Chapman's testimony about usability and the other officers' testimony about the details of appellant's purchase of the cocaine took place during the People's case-in-chief. As we discuss, *supra*, that evidence is sufficient to prove the existence of the usability element. If anything, the evidence was stronger at the time of the section 1118.1 motion, since the officers' testimony that appellant purchased cocaine from co-defendant Williams was uncontradicted.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.